REMARKS

Applicant respectfully requests reconsideration of the present application. No new matter has been added to the present application. Claims 1-10 and 12-30 have been rejected in the Office Action. No claims have been amended, no new claims have been added, and no claims have been canceled in this Response. Accordingly, claims 1-10 and 12-30 are pending herein. Claims 1-10 and 12-30 are believed to be in condition for allowance and such favorable action is respectfully requested.

Applicants' representative thanks the Examiner for granting a telephonic interview on September 15, 2005. During the interview, differences between the independent claims and applied art, U.S. Patent No. 5,913,040 to Rakavy et al. (the "Rakavy reference") and International Publication No. WO 00/01123 (the "Chiu reference"), were discussed. Applicants' representative indicated that the Rakavy and Chiu references, either alone or in combination, fail to teach or suggest all of the claim limitations of independent claim 1 (as well as similar limitations of the other independent claims). In particular, Applicants' representative explained that the Rakavy and Chiu references fail to teach or suggest identifying a maximum monitored level of actual bandwidth utilization and calculating a threshold level of utilization as a function of the maximum monitored level of utilization as recited in independent claim 1.

Rejections based on 35 U.S.C. § 103

A.   Applicable Authority

The basic requirements of a *prima face* case of obviousness are summarized in MPEP § 2143 through § 2143.04. In order "[t]o establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art,

to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success [in combining the references]. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art and not based on applicant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991)". *See* MPEP § 2143. Further, in establishing a *prima face* case of obviousness, the initial burden is placed on the Examiner. "To support the conclusion that the claimed invention is directed to obvious subject matter, either the references must expressly or impliedly suggest the claimed invention or the examiner must present a convincing line of reasoning as to why the artisan would have found the claimed invention to have been obvious in light of the teachings of the references. *Ex parte Clapp*, 227 USPQ 972, 972, (Bd. Pat App. & Inter. 1985)." *Id. See also* MPEP § 706.02(j) and § 2142.

B.   Rejections based on Rakavy and Chiu

Claims 1-9, 14-27, and 29-30 were rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 5,913,040 to Rakavy et al. (the "Rakavy reference") in view of International Publication No. WO 00/01123 (the "Chiu reference"). Applicants respectfully submit that a *prima facie* case of obviousness has not been established for claims 1-9, 14-27, and 29-30. In particular, there is no motivation or suggestion to combine or modify the Rakavy and Chiu references to achieve the claimed invention. In addition, the Rakavy and Chiu references, either alone or in combination, fail to teach or suggest all the claim limitations for each of claims 1-9, 14-27, and 29-30. Accordingly, Applicants respectfully traverse this rejection, as hereinafter set forth.

1.   Lack of Suggestion or Motivation to Combine the Cited References

The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art and not based on applicant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991)". *See* MPEP § 2143. "The initial burden is on the examiner to provide some suggestion of the desirability of doing what the inventor has done. 'To support the conclusions that the claimed invention is directed to obvious subject matter, either the references must expressly or impliedly suggest the claimed invention or the examiner must present a convincing line of reasoning as to why the artisan would have found the claimed invention to have been obvious in light of the teachings of the references.' *Ex parte Clapp*, 227 USPQ 972, 973 (Bd. Pat App. & Inter. 1985)." MPEP § 2142. MPEP § 2142 further states that "[w]hen the motivation to combine the teachings of the references is not immediately apparent, it is the duty of the examiner to explain why the combination of the teachings is proper." The Examiner is required to present actual evidence and make particular findings related to the motivation to combine the teachings of the references. *In re Kotzab*, 55 USPQ2d 1313, 1317 (Fed. Cir. 2000); *In re Dembiczak*, 50 USPQ2d 1614, 1617 (Fed. Cir. 1999). "Broad conclusory statements regarding the teaching of multiple references, standing alone, are not "evidence." *Dembiczak*, 50 USPQ2d at 1617. "'The factual inquiry whether to combine the references must be thorough and searching.'" *In re Lee*, 61 USPQ2d 1430, 1433 (Fed. Cir. 2002) (citing *McGinley v. Franklin Sports, Inc.*, 60 USPQ2d 1001, 1008 (Fed. Cir. 2001)). The factual inquiry must be based on objective evidence of record, and cannot be based on subjective belief and unknown authority. *Id.* at 1433-34. The Examiner must explain the reasons that one of ordinary skill in the art would have been motivated to select the references and to combine

them to render the claimed invention obvious. *In re Rouffet*, 47 USPQ2d 1453, 1459 (Fed. Cir.

1998).

The Office Action has not presented any evidence why the Rakavy and Chiu

references would have been combined. The mere fact that references <u>can</u> be combined or

modified does not render the resultant combination obvious unless the prior art also suggests the

desirability of the combination. MPEP § 2143.01. Specifically, there must be a suggestion or

motivation in the references to make the combination or modification. *Id.* The sole support in

the Office Action for such a combination is that ""[i]t would be obvious to a person of ordinary

skill in the art at the time the invention was made to combine the teaching of Rakavy with Chiu

in order to avoid the problem of driving transmission rate thresholds too low based upon

unacceptably low values as supported by Chiu." Office Action, pg. 3. The Office Action cannot

rely on a purported benefit of the combination without first supporting the motivation to make

the combination. Such motivation does not appear anywhere in either of the references, and the

Office Action has not presented any actual evidence in support of the same. Instead, the Office

Action relies on broad conclusory statements, subjective belief, and unknown authority. Such a

basis does not adequately support the combination of references; therefore, the combination is

improper and should be withdrawn.

2. *References Fail to Teach or Suggest All Claim Limitations*

Not only is there no suggestion or motivation to combine the Rakavy and Chiu

references, but even if they were combined, the references still fail to teach or suggest all the

claim limitations for each of claims 1-9, 14-27, and 29-30. Initially, independent claim 1 is

directed to a method of transferring a set of data over a network. The method includes

monitoring the level of actual network bandwidth utilization; identifying a maximum monitored

level, wherein the maximum monitored level is a maximum of the monitored level of actual bandwidth utilization; calculating a threshold level of utilization as a function of the maximum monitored level of utilization; and if the actual level is less than the threshold level, receiving at least a portion of the set of data over the network.

In contrast, the Rakavy reference discloses a method for downloading data in the background without interfering with a user's other network activity by monitoring the percentage of time the network connection is busy over a given time period and only downloading data when the line utilization is below a predetermined threshold (i.e. percentage of time busy). *Rakavy*, col. 13, lines 5-38. While the method in the Rakavy reference and Applicants' claimed invention address essentially the same problem, Applicants' claimed invention provides a substantial advantage over Rakavy's solution in that it optimizes the use of network bandwidth. By contrast, Rakavy's solution is less effective because downloading data based on the percentage of time the network connection is busy will often result in underutilization of the network bandwidth (as explained in Applicants' specification at page 16, line 18 through page 17, line 1).

In response to the above argument, previous Office Actions have noted that the Rakavy reference discusses monitoring the current line utilization (e.g., bytes/second) (*see, e.g., Office Action*, mailed 1/13/05, p. 12-13). However, this response considers only a portion of the Rakavy reference, while impermissibly ignoring other portions of the reference. "A prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention. *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 721 F.2d 1540, 220 USPQ 303 (Fed Cir. 1983), cert. denied, 469 U.S. 851 (1984)." MPEP § 2141.02. Accordingly, it is important to note that the Rakavy reference teaches away from Applicants'

claimed invention because the Rakavy reference teaches that data should only be transferred during periods of low line utilization (*Rakavy*, col. 13, lines 11-12), which "occurs when the communications line is busy no more than a predetermined percentage of time" (*Id.*, col. 13, lines 35-36). In other words, although the Rakavy reference may discuss measuring communications line utilization in bytes/second, it appears that information is used to determine whether the percentage of time the communications line is busy is below a threshold percentage of time busy as indicated at column 13, lines 35-36, which is significantly different from Applicant's approach in the present application. Thus, Rakavy's approach does not involve calculating a threshold level of utilization as a function of a maximum monitored level of utilization as in claim 1. Rather, the Rakavy reference teaches a different approach based on the percentage of time the network connection is busy, and Rakavy's approach is a less effective one for the reasons stated above and in Applicant's specification at page 16, line 18 through page 17, line 1. Thus, Applicant's claimed invention advances the state of the art beyond what is taught by the Rakavy reference.

Page 2 of the Office Action indicates that the Rakavy reference discloses "calculating a threshold level of utilization as a function of the current monitored level of utilization", referring to column 13, line 66 to column 14, line 7. However, closer review of the Rakavy reference indicates that it fails to teach or suggest that the threshold level is a function of a <u>monitored</u> level of actual bandwidth utilization. The Rakavy reference discusses a threshold (i.e. percentage of time a communications line is busy) that "may be fixed (typically at 30%), user-configurable, or dynamic." *Id.*, col. 13, lines 35-38. It is clear that a fixed threshold or a user-configurable threshold would not be based on a monitored level of actual bandwidth utilization. In addition, the Rakavy reference's discussion of a dynamic threshold not only fails

to teach or suggest that it may be dynamically determined as a function of a <u>monitored</u> level of

actual bandwidth utilization but teaches away from the claimed invention. As noted previously,

"[a] prior art reference must be considered in its entirety, i.e., as a <u>whole</u>, including portions that

would lead away from the claimed invention. *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 721

F.2d 1540, 220 USPQ 303 (Fed Cir. 1983), cert. denied, 469 U.S. 851 (1984)." MPEP §

2141.02. Accordingly, it is important to note that when discussing a dynamic threshold, the

Rakavy reference refers to taking into account the "Polite Agent" job. In particular, Rakavy

indicates that "[w]hen dynamically determined, the threshold may vary with a number of

parameters such as the length of time the TCP/IP Polite Agent 280 has been waiting to transmit,

the number or type of Polite Agent Jobs 285 on the Polite Agent Queue 286, the amount of data

which the TCP/IP Polite Agent wishes to transfer, and the type of data being transferred." *Id.*,

col. 13, lines 38-44. None of these examples for dynamically determining a threshold disclose

using a <u>monitored</u> level of actual bandwidth utilization. Instead, through this discussion, the

Rakavy reference teaches away from the claimed invention by indicating that the threshold may

be adjusted based on factors associated with the "Polite Agent" job. For example, if the "Polite

Agent" job consists of a large amount of data or has been waiting for a certain period of time, a

higher threshold may be dynamically set (e.g., the communication line being busy 50% of the

time instead of the typical fixed 30% of the time). Furthermore, Applicants could not find any

other disclosure by the Rakavy reference teaching or suggesting that the threshold level may be

calculated using a <u>monitored</u> level of utilization. Therefore, Applicants respectfully submit that

Rakavy fails to teach or suggest calculating a threshold level of utilization as a function of the

current <u>monitored</u> level of utilization as indicated in the Office Action.

Moreover, the Office Action acknowledges that the Rakavy reference fails to disclose multiple limitations of claim 1. Specifically, the Office Action admits at page 2 that "Rakavy does not disclose identifying a maximum monitored level of actual utilization and that the threshold level of utilization is calculated as a function of the maximum monitored level of utilization." The Office Action attempts to overcome the deficiencies of Rakavy's disclosure by combining it with the teaching in the Chiu reference. However, the Chiu reference fails to teach or suggest the claim limitations missing from the Rakavy reference. In addition, as noted previously, there is no motivation of suggestion to combine or modify the Rakavy and Chiu references to achieve the invention of claim 1. Accordingly, independent claim 1 is patentable over the combination of the Rakavy and Chiu references as explained more fully below.

The Chiu reference relates to detecting and controlling network congestion. *See Chiu*, p. 5, lines 1-23. Congestion in a network is detected using two acknowledgement windows at a receiving station. *Id.* at p. 5, lines 1-4. The receiving station determines a first number of messages missing in the first acknowledgement window. *Id.* The station then determines a second number of messages missing in a subsequent acknowledgement window. *Id.* The station then measures congestion on the network in response to an increase between the first number of missing messages in the first acknowledgement window, and the second number of missing messages in the second acknowledgement window. *Id.* at p. 5, lines 5-7. A transmitting station then responds to messages indicating congestion on the network by reducing its transmission rate. *Id.* at p. 5, lines 9-10. By using a previously measured high rate of transmission, the transmitting station attempts to return to this measured high rate after each incident of rate reduction by adding a constant value to the reduced rate dependent on the previously measured high rate. *Id.* at p. 5, lines 9-16.

Applicants respectfully submit that the Chiu reference fails to teach or suggest identifying a maximum monitored level, wherein the maximum monitored level is a maximum of the monitored level of actual network bandwidth utilization as recited by independent claim 1. Page 3 of the Office Action indicates for this limitation that the Chiu reference discusses a previously measured high rate of transmission for a transmitting station. However, Applicants submit that that using a previously measured high rate of transmission as discussed in the Chiu reference is different from identifying a maximum monitored level, wherein the maximum monitored level is a maximum of the monitored level of actual network bandwidth utilization as recited in independent claim 1. A level of bandwidth utilization, as used in the present application, contemplates all network activity experienced by a communications interface at a given time (see, e.g., the Applicants' specification at page 11, lines 12-23; page 14, lines 17-19; page 15, line 16 – page 16, line 7). For example, as described in the Applicant's specification at page 15, line 16 through page 16, line 7, the actual bandwidth utilization may include multiple data transmissions for multiple devices. In contrast, a rate of transmission, as used in the Chiu reference, refers to the rate of a single data transmission between a transmitting station and receiving station. *See Chiu*, pg. 5, lines 1-16. Thus, the rate of transmission in the Chiu reference may account for only a portion of the actual bandwidth utilization. Accordingly, the Chiu reference's discussion of a previously measured high rate of transmission fails to teach or suggest identifying a maximum monitored level, wherein the maximum monitored level is a maximum of the monitored level of actual bandwidth utilization.

In addition, the Chiu reference fails to teach or suggest calculating a threshold level of utilization as a function of the maximum monitored level of utilization as recited by independent claim 1. Applicant's specification, for example at page 12, line 10 through page 13,

line 8, indicates that the threshold level of utilization is a level below which data may be transferred. In addition, as recited by independent claim 1, the method includes receiving at least a portion of a set of data over the network if the actual level of utilization is less than the threshold level of utilization. In contrast, the Chiu reference discusses increasing a transmission rate from a reduced transmission rate (which was reduced as a result of network congestion defined by packet loss) to a previously measured high rate of transmission by adding a constant value to the transmission rate in a number of steps. Applicants respectfully submit that computing an amount of additive increase for increasing from a reduced rate to a previous high rate of transmission is vastly different from calculating a threshold level of utilization below which data may be transferred.

Independent claims 22 and 25 were rejected in the Office Action for similar reasons as stated for independent claim 1. Independent claim 22, which is directed to a data structure stored on a computer-readable medium, recites "a first data field containing data representing a maximum monitored level, wherein the maximum monitored level is a maximum of a monitored level of actual network bandwidth utilization," and a second data file which "is derived from said data field by calculating the threshold level as a function of the maximum monitored level." Likewise, independent claim 25 is directed to a computer-readable medium having computer-executable components including a bandwidth monitoring component which "identifies a maximum monitored level, wherein the maximum monitored level is a maximum of the monitored level of actual bandwidth utilization for the network connection," and "a threshold calculating component which calculates a threshold level of utilization as a function of the maximum monitored level of utilization identified by said bandwidth monitoring components." These two limitations in each of independent claims 22 and 25 are similar to the "identifying a

maximum monitored level" and "calculating a threshold level" limitations of claim 1. Thus, for

at least the reasons stated above with respect to claim 1, Applicants respectfully submit that the

Rakavy and Chiu reference fail to teach or suggest all the limitations of independent claims 22

and 25.

Accordingly, it is respectfully submitted that a *prima facie* case of obviousness

has not been established for independent claims 1, 22, and 25 based on the Rakavy and Chiu

references. In particular, there is no suggestion or motivation to combine or modify the Rakavy

and Chiu references to achieve the invention of independent claims 1, 22, and 25. In addition,

the Rakavy and Chiu references, either alone or in combination, fail to teach or suggest all of the

limitations of independent claims 1, 22, and 25. Accordingly, Applicants respectfully request

withdrawal of the 35 U.S.C. § 103(a) rejection of independent claims 1, 22, and 25.

Each of claims 2-9, 14-21, 29, and 30 depends, either directly or indirectly, from

independent claim 1, and accordingly, these claims are believed to be in condition for allowance

for at least the above-cited reasons. In addition, each of claims 23 and 24 depends, either

directly or indirectly, from independent claim 22, and accordingly, these claims are believed to

be in condition for allowance for at least the above-cited reasons. Further, each of claims 26 and

27 depends, either directly or indirectly, from independent claim 25, and accordingly, these

claims are believed to be in condition for allowance for at least the above-cited reasons. As

such, Applicants respectfully request withdrawal of the 35 U.S.C. § 103(a) rejections of

dependent claims 2-9, 14-21, 23, 24, 26, 27, 29, and 30. Furthermore, many of the dependent

claims are separately patentable because they contain additional limitations not found in either

the Rakavy or Chiu reference. For example, in claims 5, 23, and 27, the threshold level is a

predetermined percentage of the maximum monitored level. Neither the Rakavy reference nor

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the Chiu reference teach or suggest the limitations of claims 5, 23, and 27 in the context of their respective base claims 1, 22 and 25.

Dependent claim 9 is the subject of a rejection based on "Official Notice" in addition to the Rakavy and Chiu references. Dependent claim 9 is directed to a method including "incrementing a counter each time a discrete portion of the data is received over the network." The Office Action takes "Official Notice" that incrementing a counter each time a portion of data is received is well known in the art and contends that it would have been obvious to one of ordinary skill in the art to combine this well known concept with the combined teachings of the Rakavy and Chiu references. However, as pointed out above, the Rakavy and Chiu references fail to teach or suggest the limitations of the underlying base claim and there is no motivation or suggestion to combine the references. Moreover, there is no suggestion from the prior art to combine the Official Notice with Rakavy and/or Chiu, nor is there a suggestion from the prior art to modify this combination of prior art references to achieve the invention of claim 9. Accordingly, Applicant submits that claim 9 is patentable over the proposed combination of Rakavy, Chiu, and the Official Notice.

C.   Rejections based on Rakavy, Chiu, and Watanabe

Claim 10 was rejected under 35 U.S.C. § 103(a) as being unpatentable over the Rakavy reference in view of the Chiu reference and further in view of U.S. Patent No. 6,285,662 to Watanabe et al. (the "Watanabe reference"). Dependent claim 10 depends indirectly from independent claim 1, and the Office Action appears to rely on the Rakavy and Chiu references (and not the Watanabe reference) for the limitations from this base claim. Accordingly, Applicants respectfully submit that dependent claim 10 is patentable for at least the reasons stated above with respect to independent claim 1. Moreover, there is no suggestion from the

prior art to combine the Watanabe reference with the Rakavy reference and/or the Chiu reference, nor is there a suggestion from the prior art to modify this combination of prior art references to achieve the invention of claim 10. Accordingly, Applicants submit that dependent claim 10 is patentable over the proposed combination of the Rakavy, Chiu, and Watanabe references and respectfully request withdrawal of the 35 U.S.C. § 103(a) rejection of dependent claim 10.

D.   Rejection based on Rakavy, Chiu, and Elzur

Claim 12 was rejected under 35 U.S.C. § 103(a) as being unpatentable over the Rakavy reference in view of the Chiu reference and further in view of U.S. Patent No. 6,427,169 to Elzur et al. (the "Elzur reference"). Dependent claim 12 depends indirectly from independent claim 1, and the Office Action appears to rely on the Rakavy and Chiu references (and not the Elzur reference) for the limitations from this base claim. Accordingly, Applicants respectfully submit that dependent claim 12 is patentable for at least the reasons stated above with respect to independent claim 1. In addition, the Elzur reference, which relates to parsing a packet header, is non-analogous art and thus cannot properly be relied on to reject claim 12 because it is neither in the field of Applicants' endeavor nor is it reasonably pertinent to the particular problem with which the Applicants were concerned. The Rakavy, Chiu, and Elzur references cannot properly be combined and would not achieve the claimed invention even if they were combined. Moreover, there is no suggestion from the prior art to combine the Elzur reference with the Rakavy reference and/or the Chiu reference, nor is there a suggestion from the prior art to modify this combination of prior art references to achieve the invention of claim 12. Accordingly, Applicants submit that claim 12 is patentable over the proposed combination of the

Rakavy, Chiu, and Elzur references and respectfully request withdrawal of the 35 U.S.C. § 103(a) rejection of dependent claim 12.

E.   Rejection based on Rakavy, Chiu, and Kalkunte

Claim 13 was rejected under 35 U.S.C. § 103(a) as being unpatentable over the Rakavy reference in view of the Chiu reference and further in view of U.S. Patent No. 6,078,591 to Kalkunte et al. (the "Kalkunte reference"). Dependent claim 13 depends indirectly from independent claim 1, and the Office Action appears to rely on the Rakavy and Chiu references (and not the Watanabe reference) for the limitations from this base claim. Accordingly, Applicants respectfully submit that dependent claim 13 is patentable for at least the reasons stated above with respect to independent claim 1. In addition, like the Elzur reference, the Kalkunte reference is non-analogous art and thus cannot properly be relied on to reject claim 13. The Kalkunte reference, which relates to a method for selectively modifying collision delay intervals based on a detected capture effect in a half-duplex network, is neither in the field of Applicants' endeavor nor is it reasonably pertinent to the particular problem with which the Applicants were concerned. The Rakavy, Chiu, and Kalkunte references cannot properly be combined and would not achieve the claimed invention even if they were combined. Moreover, there is no suggestion from the prior art to combine the Kalkunte reference with the Rakavy reference and/or the Chiu reference, nor is there a suggestion from the prior art to modify this combination of prior art references to achieve the invention of claim 13. Accordingly, Applicants submit that claim 13 is patentable over the proposed combination of the Rakavy, Chiu, and Kalkunte references and respectfully request withdrawal of the 35 U.S.C. § 103(a) rejection of dependent claim 13.

F.   Rejection based on Rakavy, Chiu, and Buch

Independent claim 28 stands rejected under 35 U.S.C. § 103(a) as unpatentable over U.S. Patent No. 6,463,468 to Buch et al. (the "Buch reference") in view of the Rakavy reference in view of the Chiu reference. The Buch reference discloses a technique for free Internet access which involves a method for downloading video advertising files when a user is not actively using the bandwidth of the Internet connection. As shown in FIG. 11 and described at column 12, Buch's method determines the ad block size based on the available data rate and perhaps also based on system resources. If the Internet connection is being used (e.g., to download content or to send/receive email), the method checks the availability of the connection again later. However, if the Internet connection is not being used, a request is sent to the ad server for information such as the file name, the offset from the file start where the block should be downloaded, and the determined ad block size. As discussed below, Applicants respectfully submit that claim 28 is patentable over the proposed combination of the Buch, Rakavy, and Chiu references.

Independent claim 28 recites: "the actual network bandwidth utilization is less than a threshold level below which data may be transferred over the network without interfering with other network activity, wherein the threshold level is calculated as a function of a maximum monitored level, and wherein the maximum monitored level is a maximum of the monitored level of actual network bandwidth utilization." The Office Action admits at page 11 that "Buch does not disclose that the threshold level is calculated as a function of a maximum monitored level of actual network bandwidth utilization," and thus the Office Action relies on the Rakavy and Chiu references for the missing limitation. However, the missing limitation of claim 28 is similar to the corresponding language in independent claims 1, 22 and 25, so claim 28 is

patentable over the combination of the Rakavy and Chiu references for at least the reasons discussed above with respect to claims 1, 22 and 25.

It should be noted that the Buch, Rakavy, and Chiu references are not properly combinable with one another. For the reasons stated above with respect to claims 1, 22 and 25, the Rakavy and Chiu references are not properly combinable. Similarly, the Buch reference is not properly combinable with either the Rakavy reference or the Chiu reference because there is no teaching or suggestion from the prior art to do so. Accordingly, claim 28 is patentable over the proposed combination of the Buch, Rakavy, and Chiu references on the additional ground that the references are not properly combinable.
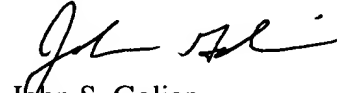
Thus, there is no teaching or suggestion in the Buch, Rakavy, and Chiu references, either individually or in combination, to calculate a threshold level as a function of a maximum monitored level of utilization as required by claim 28. Therefore, the proposed combination of the Buch, Rakavy and Chiu references would not achieve the method of clam 28. Moreover, there is no suggestion from the prior art to modify the combined teachings of the Buch, Rakavy and Chiu references to achieve the method of claim 28. For at least the reasons stated above, it is respectfully submitted that the Buch, Rakavy, and Chiu references fail to teach or suggest all of the limitations of claim 28, and thus, a *prima facie* case of obviousness has not been established for this claim. Accordingly, withdrawal of the 35 U.S.C. § 103(a) rejection of claim 28 is respectfully requested.

CONCLUSION

For at least the reasons stated above, claims 1-10 and 12-30 are in condition for allowance. Applicants respectfully request withdrawal of the pending rejections and allowance of claims 1-10 and 12-30. If any issues remain that would prevent issuance of this application,

the Examiner is urged to contact the undersigned by telephone prior to issuing a subsequent

action. It is believed that no fee is due in conjunction with the present response. However, if

this belief is in error, the Commissioner is hereby authorized to charge any amount required to

Deposit Account No. 19-2112.

Respectfully submitted,

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